

# ***WILLITS* INSTRUCTIONS**

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
DENYING APPELLANT'S REQUEST FOR *WILLITS*<sup>1</sup>  
INSTRUCTION.**

Appellant asserts that the trial court abused its discretion in denying his request for a *Willits* instruction based upon the “missing DVR.” (O.B. at 22.) This claim is meritless for any of a variety of reasons: (1) the record establishes that there was *no* recording; (2) even if there was a recording, it did not relate to the aggravated assault charges; (3) any video had no potential whatsoever to “exonerate” Appellant; and (4) Appellant fails to prove that he was prejudiced by the alleged loss of the DVR.

**A. STANDARD OF REVIEW**

A trial court’s refusal to give a requested *Willits* instruction is reviewed for an abuse of discretion. *State v. Fulminante*, 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999); *State v. Bolton*, 182 Ariz. 290, 308–09, 896 P.2d 830, 848–49 (1995). “A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have a tendency to exonerate him.” *State v. Speer*, 221 Ariz. 449, 457, ¶ 40, 212 P.3d 787, 795 (2009). Moreover, this Court must affirm the trial court’s ruling “if the result was legally correct for any reason.” *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

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<sup>1</sup> *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

To be entitled to a *Willits* instruction, a defendant must prove: (1) the State failed to preserve material evidence that had the potential to “exonerate” the defendant; and (2) the failure to preserve the evidence actually prejudiced the defendant. *Fulminante*, 193 Ariz. at 503, ¶ 62, 957 P.2d at 93; *State v. Wooten*, 193 Ariz. 357, 369, ¶ 62, 972 P.2d 993, 1005 (App. 1998). The evidence must have been within the “control” of the State or “reasonably accessible.” *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988); *see also State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App. 1987) (evidence must be “reasonably within [State’s] grasp”); *State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (App. 1986) (same). The evidence *must* have had *obvious* exculpatory potential at the time that state agents lost, destroyed, or failed to preserve or retain the evidence. *State v. Davis*, 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002); *Walters*, 155 Ariz. at 551, 748 P.2d at 780. A defendant is not entitled to a *Willits* instruction “merely because a more exhaustive investigation could have been made.” *State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995).

#### **B. FACTUAL BACKGROUND.**

Prior to trial, Appellant filed a written request for a so-called *Willits* instruction.<sup>2</sup> (R.O.A., Item 56.) Prior to opening statements, the prosecutor

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<sup>2</sup> The requested instruction read:

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this

asserted that Appellant's request for a *Willits* instruction was "relevant" only to "the disorderly conduct [count] which is being tried to the Court," and objected to "a lengthy cross regarding the video that has nothing to do with [the] assaults that took place outside the bus and at the hospital." (R.T. 1/26/11, at 4.) Appellant's counsel asserted that what happened on the bus prior to the alleged aggravated assaults was not "irrelevant" to those charges, and requested that the trial court "hear all the evidence and then we can argue for closing instructions whether *Willits* is appropriate in this case." (*Id.* at 5.) The trial court overruled the State's relevancy objection, permitting Appellant to question witnesses regarding "the video," and deferred ruling on whether a *Willits* instruction was warranted until the close of evidence. (*Id.* at 8–9.)

At trial, Sergeant Randall Miller testified that he directed police assistants Parker and Jahnke to remove the video recorder from the bus. (R.T. 1/26/11, at 118–19.) He related that they "had some kind of issue with the recorder that night" and "couldn't get it to work properly and they weren't able to download" the video. (*Id.* at 118.) He "told them to go ahead and hold it until the next day and try to download, see if they could get somebody to help them download it the next day."

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case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

(*Id.*) Sergeant Miller testified, “They tried again the next day, for whatever reason they were having difficulties with the computer and with the server trying to get information off the DVR and they were going to try to get one of the computer techs at the bus garage to assist them with it.” (*Id.* at 126.) Sergeant Miller related, “They weren’t able to get anything.” (*Id.*) When asked if the video was ever “burned or downloaded,” he testified, “Somehow, whatever happened with the recorder, I don’t know, we never did get it to work properly and nothing was downloaded as far as I know.” (*Id.* at 129.)

Regarding the positioning of cameras in the bus, Sergeant Miller testified as follows:

Q. Are you familiar with where the cameras are located on the bus?

A. Yes.

Q. And were there cameras on the bus in question this night?

A. Yes. Some of the buses have different camera systems, but the majority of them have a camera at the front door facing out towards as you enter the bus, it’s above the driver’s seat and faces the front door, there’s one that’s at the front, usually pointed back towards the back of the bus and then in the middle there’s usually another one pointed at the back and one towards the back door. So you have anywhere from three to five cameras normally.

Q. Do you know how far you can see outside the bus on these videos?

A. Not very far. We’ve had numerous accidents where we’ve had to view videos from the buses and we couldn’t see what occurred much outside the bus.

(*Id.* at 117–18.)

Police assistant Craig Jahnke testified that Sergeant Miller told him and Michael Parker “to get the video off of the bus to see if anything was captured on the video.” (R.T. 1/27/11, at 41–42.) He had to return to the station to get the keys to unlock the “outside box” and “the door to the DVR.” (*Id.* at 42.) When he returned, he unlocked the box and the DVR box and noticed “the lights were not on.” (*Id.*) He “pulled the DVR from the bus out,” then replaced it with a “spare DVR,” and “could not get the lights to come on.” (*Id.*) He related, “There’s an indicator panel that tells the bus driver the DVR is in the docking station and it’s working, and I could not get those lights to come on.” (*Id.*) When asked by Appellant’s counsel whether “this DVR wasn’t working at the time,” Jahnke testified, “All I’m saying is that when I pulled the - - lights that normally are on, telling me the DVR is running and operating, were not on when I pulled the DVR out of the docking station.” (*Id.* at 56.) Jahnke testified that he secured the DVR in his locker overnight, and gave it to Officer Barciz the next day. (*Id.* at 43.)

Regarding the number, positioning, and coverage area of the cameras, Jahnke testified that he believed that this particular bus had five cameras: (1) one that faced the double doors in the middle of the bus; (2) another in the front that faced the front doors; (3) one that shows the area where riders pay their fare; (4) another just past the front doors that points down the aisle to the back of the bus;

and (5) a fifth just past the “back middle doors” pointing toward the front of the bus. (*Id.* at 55–56.) Jahnke related that the only thing that could possibly be seen “outside the bus” would be “some shadows” or “some movement outside the door,” but only to “a couple feet outside the door.” (*Id.* at 44–45, 57–58.) And, there is no audio on the bus videos. (*Id.* at 45.)

When asked about the video, and specifically whether he remembered receiving the DVR from Craig Jahnke, Officer Barciz testified:

I don’t, and I’ve racked my brain about this because I read the reports and I know that the video came up.

The only thing I can remember, the whole thing about the video, was that we talked a little bit about it at the scene ‘cause it was relevant to how he had acted on the bus with the driver, and I remember somebody saying that they looked and none of the lights were on. *In my experience, when the lights aren’t on, the video isn’t working*

In fact, of all the videos I pulled on all the buses, which was probably ten to 20 while I was in transit, I would say maybe 50 percent of the boxes even were operable. They had a poor reliability rate.

So I don’t remember being very concerned about the video, ‘cause obviously, you know, the brunt of the charges were the felonies for assaulting us.

(*Id.* at 142–43, emphasis added.) When asked if any of the physical contact between Appellant and the officers could have been captured on the video, Officer Barciz testified:

I don't believe so. Where the altercation took place, the only place that would be slightly questionable would have been the initial thing when we jammed his hands in his pockets and I grabbed him, but I think even that - - 'cause the middle doors do have a camera that does capture, you know, as Police Assistant Jahnke said, about two feet out, maybe it would have caught a glimpse.

I can tell you it would have been very - - the video is poor quality, I guess, would be the best - -

Q. Okay.

A. So I don't believe it would have captured anything of value whatsoever.

(*Id.* at 144–45.)

Appellant testified that Officers Barciz and Sink began walking him back to the patrol car and, when Appellant “stepped down off the curb,” Officer Barciz threw him down to the ground. (R.T. 1/31/11, at 79–80, 99–100.) Appellant said he was thrown to the ground “[i]n between the middle of the back tire and the rear of the bus.” (*Id.* at 101.) He denied ever kicking Officer Sink. (*Id.* at 81.)

At the close of the evidence, Appellant argued that he was entitled to a *Willits* jury instruction on the aggravated assault counts, asserting that “the fact that we have contradicting testimony about what happened to the video make[s] the need for a *Willits* instruction[] even stronger,” even though “we don’t know if it was working or not.” (*Id.* at 134.) The State asserted that a *Willits* instruction was “definitely not relevant to the two aggravated assault counts” which were not alleged to have occurred on or near the bus. (*Id.* at 138–40.) The trial court denied

Appellant's request for a *Willits* instruction regarding the aggravated assault counts, but stated that it would consider it in its decision on the disorderly conduct count that was tried to the court. (R.T. 2/1/11, at 3.) After Appellant made "a record" regarding his request for a *Willits* instruction (*id.* at 5–7), the trial court explained its ruling in more detail (*id.* at 8–10). The trial court stated: (1) what happened on the bus was only "foundational evidence" regarding why police were summoned and that nothing that happened on the bus was a "defense" to the aggravated assault charges; (2) at best, only the area just outside the doors were in camera view, not the area where the aggravated assaults were alleged to have taken place; and (3) Appellant's own testimony failed to indicate "that anything of any import would have been captured by the cameras" in "that very small area around the doors." (*Id.* at 8–10.)

In his closing argument to the jurors, Appellant's counsel repeatedly harped upon the red herring of "the video that was not presented and given to you." (*Id.* at 22–23, 27, 31–32.)

### C. ANALYSIS.

First, the record reflects to a virtual certainty that there was *no* video of the events that occurred on the bus. Police Assistant Craig Jahnke testified that, when he opened the DVR box "the lights were not on" and that the lights "tells the bus driver the DVR is in the docking station and it's working." (R.T. 1/27/11, 42.)

When he replaced the DVR he still “could not get the lights to come on.” (*Id.*) Officer Barciz unequivocally testified that “when the lights aren’t on, the video isn’t working.” (*Id.* at 142.) Appellant presented *no* evidence to the contrary. Therefore, because there was no “evidence” that was lost or destroyed by State agents, as a matter of law Appellant was not entitled to a *Willits* instruction. *See Davis*, 205 Ariz. at 180, ¶ 38, 69 P.3d at 133 (*Willits* claim may not be based upon “sheer speculation”); *State v. Dunlap*, 187 Ariz. 441, 464, 930 P.2d 518, 541 (App. 1996) (*Willits* instruction not given where theory is “entirely speculative”).

Second, aside from the fact that there was no video, if there was one, it had no potential whatsoever to “exonerate” Appellant on the aggravated assault counts. *See Speer*, 221 Ariz. at 457, ¶ 40, 212 P.3d at 795 (to be entitled to a *Willits* instruction, a defendant must “establish that the lost evidence would have a tendency to exonerate him”); *Wooten*, 193 Ariz. at 369, ¶ 62, 972 P.2d at 1005 (to be entitled to a *Willits* instruction, “a defendant must show that the State failed to preserve obviously material evidence that might exonerate him”). It was undisputed that whatever happened between Appellant and Officers Sink and Barciz that resulted in the aggravated assault charges occurred at least 10 to 15 feet to the rear of the bus (Count 3), and hours later at John C. Lincoln Hospital (Count 2). (R.T. 1/26/11, at 92–93, 113–14; R.T. 1/27/11, at 34–35, 71, 75–76, 115–17, 123, 139–40; R.T. 1/31/11, at 56, 81, 85–86.) Thus, nothing whatsoever regarding

the alleged aggravated assaults could possibly have been on the bus video, even if it had been operational. Moreover, Appellant could have behaved like Mother Theresa on the bus (by his own admissions, he did not), and the video has no possibility of exonerating him regarding what occurred minutes and hours later. Appellant confuses evidence that might have corroborated his testimony (if the video was operational) regarding what happened on the bus (disturbing the peace count) with evidence that has the potential to “exonerate” him on the aggravated assault counts. The trial court did consider the fact that the (non-existent) video was lost or misplaced by the State in considering the disturbing the peace count. This was *more* than Appellant was entitled to receive.

Third, Appellant’s claim is speculative in the extreme. Assuming, *arguendo*, that the video even exists (itself an extremely speculative, and almost certainly false, assumption), based on the evidence presented at trial, it is far more likely that the video would have further inculpated Appellant (at least on the disturbing the peace count) and visually exposed him as the despicable human being that he is. *See State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988) (trial court did not abuse its discretion in refusing to give a *Willits* instruction where “nothing except speculation” suggested that the lost evidence would be exculpatory); *Perez*, 141 Ariz. at 464, 687 P.2d at ¶ 1219 (no abuse of discretion in refusing to give a *Willits* instruction where defendant failed to present any evidence showing that the

lost videotape of the crime would have exonerated him); *Dunlap*, 187 Ariz. at 464, 930 P.2d at 531 (defendant not entitled to a *Willits* instruction because his “claim that the destroyed or lost files would have supported his theory of the case entitling him to a *Willits* instruction is entirely speculative”).

Finally, Appellant utterly fails to establish that he was “prejudiced” by loss of the DVR. See *Fulminante*, 193 Ariz. at 503, ¶ 62, 975 P.2d at 93; *Perez*, 141 Ariz. at 464, 687 P.2d at 1219. As previously discussed, even if there was video on the DVR, it had no potential to “exonerate” or even exculpate Appellant on the aggravated assault counts. In fact, Appellant clearly “*benefitted*” by the loss of the DVR. *Perez*, 141 Ariz. at 464, 687 P.2d at 1219 (emphasis in original). It allowed Appellant to dangle the (likely non-existent) video before the jurors as a red herring to attempt to divert their attention from the overwhelming evidence establishing his guilt on the aggravated assault counts to a virtual certainty. (See R.T. 2/1/11, 22–23, 27, 31–32.)

For *any* of the above reasons, the trial court did not abuse its discretion in denying Appellant’s request for a *Willits* instruction on the aggravated assault counts.

**THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR A FACTUALLY MISLEADING AND LEGALLY INCORRECT INSTRUCTION. MOREOVER, ANY POSSIBLE ERROR WOULD BE HARMLESS.**

Appellant asserts that the trial court erred in denying his request for a so-called *Willits* instruction. Appellant takes the position that he was entitled to a *Willits* instruction because the police failed to “find the stick” that Appellant jammed into the conveyor belt and preserve it for fingerprint examination by Appellant. Appellee submits that, in light of the United States Supreme Court’s decision in *Arizona v. Youngblood*, 488 U.S. 51, 102 S. Ct. 333, 102 L. Ed. 2d 281 (1988), *Willits* instructions are no longer appropriate under the due process clauses of either the United States or Arizona Constitutions. Further, even if *Willits* instructions are still viable, the trial court did not abuse its discretion in refusing to give such an instruction in this case.

**A. IN LIGHT OF RECENT UNITED STATES SUPREME COURT RULINGS, GIVING A WILLITS INSTRUCTION IS NO LONGER APPROPRIATE.**

The legal basis for the requirement of giving a so-called *Willits* instruction has always been rather curious, if not tenuous. The instruction “approved” of by the Arizona Supreme Court in 1964 reads as follows:

If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed, or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest.

*Willits*, 96 Ariz. at 187, 393 P.2d at 276; *see also State v. Leslie*, 147 Ariz. 38, 47, 708 P.2d 719, 728 (1985). In approving the above instruction, the Arizona Supreme Court did not purport to rely upon *any* state or federal constitutional, or state statutory, provision; the court simply stated:

We think that the rule permitting an inference is not based only on the notion that the destruction is motivated by a desire to conceal the truth. Evidence, of course, may be innocently destroyed without a fraudulent intent simply through carelessness or negligence or, as the case might have appeared to the jury here, an unwillingness to make the necessary effort to preserve it. In any event, the State cannot be permitted the advantage of its own conduct in destroying evidence which might have substantiated the defendant's claim regarding the missing evidence. But the damage to the defendant is equally great because the evidence was no longer available at the trial by which the facts with certainty could be determined.

That the jury may conclude a fraudulent intent from the spoliation or destruction of an article is a fact which may be inferred from all the evidence. Such a deduction is not necessary in order that the inference as to the true fact may operate in the defendant's favor. The jury could accept the explanation that the dynamite was dangerous to keep and still believe that this was not an adequate reason for its destruction in the light of its relative importance to the outcome of the case. Had the instruction been given, the jury would have been in the position of weighing the explanation and, if they believed it was not adequate, an inference unfavorable to the prosecution could have been drawn. This in itself could create a reasonable doubt as to the defendant's guilt.

*Willits*, 96 Ariz. at 191, 393 P.2d at 279. Thus, it appears that the supreme court was simply of the opinion that the giving of a *Willits* instruction—telling the jurors that they may infer that the evidence is adverse to the State on the absence of any such showing—was a “good idea.” In *State v. Green*, 103 Ariz. 80, 82, 436 P.2d

899, 901 (1968), the supreme court simply stated that, in *Willits*, it has “approved” the instruction.

The first mention of “due process” in the context of a *Willits* instruction was in the supreme court’s decision in *State ex rel. Hyder v. Hughes*, 119 Ariz. 261, 580 P.2d 722 (1978), decided upon *federal* due process grounds. In *Hughes* the police destroyed certain evidence following the defendant’s entry of a guilty plea. The plea was subsequently set aside and, following reinstatement of the charges, the defendant moved for dismissal of the charges against him arguing that, pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), he was denied due process because some of the destroyed evidence may possibly have been exculpatory. *Id.*, 119 Ariz. at 262, 580 P.2d at 723. The supreme court discussed several federal cases, concluding that destruction of the evidence did not deny the defendant due process. *Id.*, 119 Ariz. at 263–64, 580 P.2d at 724–25. The court further stated, “We think that where evidence has been lost or destroyed by the prosecution, lacking a clear showing of prejudice an accused is protected by giving an instruction similar to that found appropriate in *State v. Willits*.” *Id.*, 119 Ariz. at 264, 580 P.2d at 725.

Subsequently, in *State v. Hannah*, 120 Ariz. 1, 583 P.2d 888 (1978), the supreme court upheld a trial court’s dismissal of arson and filing a fraudulent insurance claim charges on the ground that the State had inadvertently destroyed

“certain items” collected from the scene of the fire, thereby precluding the defendant from conducting an examination on the items “from which exculpatory evidence might be obtained.” *Id.*, 120 Ariz. at 1–2, 583 P.2d at 888–89. Acknowledging its prior decision in *Hughes*, the supreme court affirmed the trial court’s dismissal of the charges, stating, “we think (the defendant) has been so seriously prejudiced by the loss of evidence that he has been denied due process and that the giving of a *Willits* instruction will not assure him a fair trial.” *Id.*, 120 Ariz. at 2, 583 P.2d at 889.

The *first* case to explicitly state that, in certain circumstances, the giving of a *Willits* instruction was mandated by “due process” was *State v. Rivera*, 152 Ariz. 507, 733 P.2d 1090 (1987), wherein the supreme court stated, “In instances where the evidence is no longer available because the state has destroyed the evidence or failed in its duty to preserve the evidence, the defendant’s *due process right* may nonetheless be protected by the court giving a *Willits* instruction to the jury.” 152 Ariz. at 511, 733 P.2d at 1094 (emphasis added). Although, the court cited to its prior decision in *State v. Perez*, 141 Ariz. 459, 687 P.2d 1214 (1984), to support its conclusion, a review of *Perez* reveals *no* mention whatsoever of “due process.” Rather, in *Perez*, the supreme court simply stated:

We have previously held that where evidence which might have tended to exonerate the defendant is destroyed while in the state’s possession, a defendant is entitled to a *Willits* instruction. We hold today that where the state fails to act in a timely manner to ensure the

preservation of evidence that is obviously material, and reasonably accessible, a defendant is entitled to a *Willits* instruction upon a showing that he or she was prejudiced thereby. In other words, where the state failed to procure obviously material evidence, the defendant must show actual prejudice before he or she can claim entitlement to a *Willits* instruction.

141 Ariz. at 464, 687 P.2d at 1219 (citations omitted). In subsequent decisions, the supreme court has bandied about the words “due process” in the context of a *Willits* instruction, but it has not analyzed, nor even discussed, the source of such a constitutional requirement. See, e.g., *State v. Serna*, 163, Ariz. 260, 264, 787 P.2d 1056, 1060 (1990); *State v. Tucker*, 157 Ariz. 433, 443, 759 P.2d 579, 589 (1988).

Whatever the “source” of the due process basis of a *Willits* instruction, it is now clear that no such requirement exists—under either the federal or state<sup>3</sup> constitutions. In *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), the United States Supreme Court rejected the contention that the Due Process Clause of the Fourteenth Amendment required states to preserve

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<sup>3</sup> This Court has noted that the identical wording of the due process clauses of the state and federal constitutions indicate that the provisions are “coterminous.” *State v. Herrera-Rodriguez*, 164 Ariz. 49, 790 P.2d 747 (Ct. App. 1989) (Rev. Granted). The Arizona Supreme Court has never held otherwise and has consistently relied upon the due process clause of the Fourteenth Amendment in discussing the limitations of “due process.” See, e.g., *Oshrin v. Coulter*, 142 Ariz. 109, 111–12, 688 P.2d 1001, 1003–04 (1984); *Scales v. City Court of Mesa*, 122 Ariz. 231, 233–35, 594 P.2d 97, 99–101 (1979); *State ex rel. Hyder v. Hughes*, 119 Ariz. at 263–64, 580 P.2d at 724–25. Thus, in the absence of a statement by the Arizona Supreme Court to the contrary, the due process clause of Article 2, Section 4 of the Arizona Constitution provides no greater due process rights than does the Fourteenth Amendment of the federal constitution.

breath test samples prior to admitting breath test results in evidence in drunk driving prosecutions. In so holding, the Court stated:

Whatever the duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

*Id.* at 488–89.

While *Trombetta* assists in developing a standard for *what* material evidence the police are required to preserve, *Arizona v. Youngblood* sets the standard for what constitutes a due process violation when this material evidence is lost or destroyed. In *Youngblood*, a prosecution for sexual assault, kidnapping, and child molestation, the State failed to preserve semen samples from the victim's clothes that could have been preserved by prompt refrigeration. *Youngblood*, 488 U.S. at 52–54. Testing of these semen samples, if properly preserved, may have demonstrated that the defendant was not the perpetrator. *Id.* at 54–55. After a jury trial, the defendant was convicted as charged. *Id.* at 52. Division Two of this Court found no bad faith on the part of the police but, nevertheless, reversed the conviction stating:

[W]hen identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process.

*State v. Youngblood*, 153 Ariz. 50, 54, 734 P.2d 592, 596 (Ct. App. 1986). The United States Supreme Court granted the State's petition for writ of certiorari and reversed Division Two's decision. *Youngblood*, 488 U.S. at 55.

The Court began its analysis by reaffirming its holding in *Brady v. Maryland*, in which the Court stated:

[T]he suppression by the prosecution of evidence favorable to the accused upon request violates due process where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of the prosecution.

373 U.S. at 87. The Court stated that the reasoning in the Arizona Court of Appeals' decisions in *Youngblood* and *Escalante*<sup>4</sup> marked a "sharp departure" from *Trombetta*, which only required that the prosecution preserve evidence of known exculpatory value. *Youngblood*, 488 U.S. at 56. The Court emphasized that the Due Process Clause is not violated when the lost or destroyed evidence is only *potentially* exculpatory:

[T]he Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in *Trombetta*, that "[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed."

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<sup>4</sup> *State v. Escalante*, 155 Ariz. 55, 734 P.2d 597 (Ct. App. 1986).

*Id.* at 57–58. Therefore, due process does not require that the State preserve *all* material that might be of conceivable evidentiary significance in a particular prosecution. A defendant’s due process rights are *only* violated when the State destroys *known* potentially useful evidence:

[R]equiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. *We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute denial of due process of law.*

*Id.* at 58 (emphasis added).

Prejudice to a defendant’s case is now irrelevant in determining whether there exists a violation of the Due Process Clause of the Fourteenth Amendment. Consequently, for a defendant to successfully argue that his due process rights were violated, he must demonstrate that the police acted in *bad faith* in not preserving evidence of known exculpatory value. After *Youngblood*, a defendant who maintains that police lost or destroyed evidence of potentially exculpatory value must present this issue to the trial court. If the trial court finds that the police acted in bad faith in destroying evidence of exculpatory value, then the defendant’s due process rights have been violated. If the trial court finds that the State acted in good faith, the negative inference provided in a *Willits* jury instruction, that the

jurors may infer the true fact against the State's interest, is factually misleading, and legally incorrect.

In an article entitled "Absent Evidence," which was written before the benefit of *Youngblood*, Judge Joseph M. Livermore stated that adverse inferences in jury instructions, if they are justified at all, should be primarily conceived as mechanisms to ensure availability of evidence:

While police performance might be improved by the sanction of an adverse inference, negligence will never be eliminated. To distort factfinding in every instance of negligence may be too high a price to pay for whatever deterrent value the inference would have. It would still be appropriate for a jury to harbor a reasonable doubt because certain evidence was unavailable, and an argument to that effect could be made. But it hardly seems right to invite such a doubt by saying that the law requires or invites the jury to infer that such evidence would be favorable to defendant.

Livermore, *Absent Evidence*, 26 Ariz. L. Rev. 27, 39 (1984).

The State therefore contends that *Trombetta* and *Youngblood* overrule *Rivera* and *Willits*, and that this Court, pursuant to the Supremacy Clause of Article IV of the United States Constitution and Article 2, Section 3 of the Arizona Constitution, should no longer follow *Willits* or its progeny.

**B. THE TRIAL COURT PROPERLY REFUSED TO GIVE A WILLITS INSTRUCTION.**

Even if this Court finds that a *Willits* instruction is still viable, Appellant was not entitled to one. A defendant is entitled to a *Willits* instruction *only* if he can prove (1) the State failed to preserve material evidence that was accessible and

tended to exonerate the defendant, and (2) there was resulting prejudice. *State v. Hansen*, 156 Ariz. 291, 295, 751 P.2d 951, 955 (1988); *State v. Boston*, 170 Ariz. 315, 318, 823 P.2d 1323, 1326 (Ct. App. 1991). Whether either showing has been made is a question for the trial court; its decision to forego a *Willits* instruction for failure to satisfy either or both of the requirements will not be disturbed on appeal absent a clear abuse of discretion. *Perez*, 141 Ariz. at 464, 687 P.2d at 1219; *State v. Willcoxson*, 156 Ariz. 343, 346–47, 751 P.2d 1385, 1388–89 (Ct. App. 1988).

Appellant can meet neither requirement necessary to obtain a *Willits* instruction. First, it is debatable whether the stick was “reasonably accessible” to the police. Virgil Harris testified that he, or other Holsum personnel, “showed” the stick to the police. (R.T. of Feb. 12, 1992, at 55.) Detective Whipp acknowledged that the “stick was never submitted to the police.” (*Id.* at 65.) Nevertheless, assuming arguendo that the stick was reasonably accessible to the police, it could not possibly have “exonerated” Appellant. The absence of Appellant’s fingerprints, or the presence of another person’s fingerprints, on the stick would not show that Appellant did not jam the stick into the conveyor belt. The stick had been attached to a picket sign and, doubtlessly, was handled by more than one person. Moreover, Detective Whipp testified that any attempt to lift a fingerprint off the stick would result in “[m]erely a smudge,” insufficient for analysis. (*Id.* at 67–68.) For the

same reasons, Appellant has not been prejudiced as a result of the police not locating and seizing the stick.

Finally, any possible error in failing to give a *Willits* instruction would, under the facts of this case, clearly be harmless. There was no doubt whatsoever concerning the identification of Appellant. Appellant greeted MacKenzie and Lanning by informing them what he intended to do with their girlfriends later that night, obviously focusing their attention on him. After Lanning left to get their supervisor, MacKenzie watched Appellant walk through the door and up to the conveyor belt, jam the stick into the conveyor belt, then turn and walk out of the bakery. Within minutes he pointed Appellant out to Virgil Harris—a person who had known Appellant for about 3 years. The simple fact of the matter is that Appellant had no defense and his conviction was a foregone conclusion. Accordingly, any possible error in not giving a *Willits* instruction would be harmless.

### CONCLUSION

For the reasons set forth above, Appellant respectfully requests that Appellant's convictions and the sentences imposed by the trial court be affirmed.



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Court of Appeals of Arizona,  
Division 2, Department B.  
The STATE of Arizona, Appellee,  
v.  
Robert Charles GLISSENDORF, Appellant.

No. 2 CA-CR 2012-0405.  
Sept. 30, 2013.  
Reconsideration Denied Oct. 23, 2013.

**Background:** Defendant was convicted in the Superior Court, Pima County, No. CR20112756001, Michael O. Miller, J., of two counts of child molestation and he appealed.

**Holdings:** The Court of Appeals, Eckerstrom, J., held that:

- (1) defendant was entitled to a *Willits* instruction permitting a negative inference based upon state's destruction of video recording of alleged victim's initial interview with police ten years earlier;
- (2) a showing of bad faith, negligence or wrongdoing on the part of the state is not necessary to warrant a *Willits* instruction;
- (3) trial court's erroneous failure to give requested *Willits* instruction was not harmless; and
- (4) evidence did not support trial court's finding regarding similarity of prior conduct used to show aberrant sexual propensity.

Reversed and remanded in part and

West Headnotes

#### [1] Constitutional Law 92 ⚡4580

92 Constitutional Law  
92XXVII Due Process  
92XXVII(H) Criminal Law  
92XXVII(H)4 Proceedings and Trial  
92k4578 Charging Instruments; Indictment and Information  
92k4580 k. Neglect or delay. Most

#### Cited Cases

The Due Process Clauses of the Fifth and Fourteenth Amendments prevent the state from bringing criminal charges against a person after period of unreasonable delay. U.S.C.A. Const.Amends. 5, 14.

#### [2] Constitutional Law 92 ⚡4580

92 Constitutional Law  
92XXVII Due Process  
92XXVII(H) Criminal Law  
92XXVII(H)4 Proceedings and Trial  
92k4578 Charging Instruments; Indictment and Information  
92k4580 k. Neglect or delay. Most

#### Cited Cases

To establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, and that the defendant has actually been prejudiced by the delay. U.S.C.A. Const.Amends. 5, 14.

#### [3] Indictment and Information 210 ⚡7

210 Indictment and Information  
210II Finding and Filing of Indictment or Presentment  
210k7 k. Term of court or time of finding.  
Most Cited Cases

A defendant bears a heavy burden to prove that pre-indictment delay caused actual prejudice.

#### [4] Criminal Law 110 ⚡1149

110 Criminal Law  
110XXIV Review  
110XXIV(N) Discretion of Lower Court  
110k1149 k. Amendments and rulings as to indictment or pleas. Most Cited Cases  
Appellate court reviews for an abuse of discretion a trial court's ruling on a motion to dismiss based on unreasonable pre-indictment delay.

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rape her was not harmless in child molestation prosecution arising out of defendant's alleged act of touching the genitals of sleeping children. 17A A.R.S. Rules of Evid., Rule 404(c)(1)(C).

[34] Criminal Law 110 ➡ 1159.3(1)

110 Criminal Law  
110XXIV Review  
110XXIV(P) Verdicts  
110k1159 Conclusiveness of Verdict  
110k1159.3 Conflicting Evidence  
110k1159.3(1) k. In general. Most

Cited Cases

Criminal Law 110 ➡ 1159.4(1)

110 Criminal Law  
110XXIV Review  
110XXIV(P) Verdicts  
110k1159 Conclusiveness of Verdict  
110k1159.4 Credibility of Witnesses  
110k1159.4(1) k. In general. Most

Cited Cases

It is not the appellate court's role to evaluate the credibility of witness testimony and resolve conflicts in the evidence.

\*248 Thomas C. Horne, Arizona Attorney General by Joseph T. Maziarz and Alan L. Amann, Tucson, Attorneys for Appellee.

Lori J. Lefferts, Pima County Public Defender by Kristine Maish, David J. Euchner, and Katherine A. Estavillo, Tucson, Attorneys for Appellant.

OPINION

ECKERSTROM, Judge.

¶ 1 Following a jury trial, appellant Robert Glissendorf was convicted of two counts of child molestation and sentenced to consecutive prison terms totaling thirty-four years. On appeal, he argues the state unreasonably delayed his prosecution, the trial court erred in refusing to give a jury instruction concerning the destruction of evidence, and the court erroneously admitted evidence of an

aberrant sexual propensity pursuant to Rule 404(c), Ariz. R. Evid. We conclude the trial court erred in failing to provide the instruction, and we therefore reverse Glissendorf's conviction and seventeen-year sentence on count one.<sup>FN1</sup> In addition, because we agree with Glissendorf that the trial court erred in its Rule 404(c) analysis, we remand for further proceedings consistent with this opinion.

FN1. Our disposition on this count renders moot Glissendorf's additional argument that count one is an unconstitutionally duplicious charge. In the event of a retrial, Glissendorf may assert a timely objection and seek to cure any duplicity problem either by requesting a special verdict form or jury instruction. *See State v. Butler*, 230 Ariz. 465, n. 4, 286 P.3d 1074, 1079 n. 4 (App.2012).

Factual and Procedural Background

¶ 2 In August 2011, Glissendorf was charged with two counts of child molestation based on acts he had committed against separate victims. Count one alleged he had molested Olivia on a particular day between 1997 and 1999, when she was under eight years old; count two alleged he had molested Tamora, then six years old, at some point between 2009 and 2010.<sup>FN2</sup>

FN2. For ease of reading, and in order to preserve the victims' anonymity, we have provided pseudonyms for E.G. and I.K., the respective victims in counts one and two. *See Ariz. R. Sup.Ct. 111(i)*.

¶ 3 At trial, Olivia testified that Glissendorf had molested her one night when they both were staying at a relative's house. According to Olivia, she first awoke on the living room floor, noticed her pajamas and underwear had been pulled down, observed Glissendorf touching her vagina, and went back to sleep. She then awoke in his bedroom and observed him touching her vagina again. Tamora testified that Glissendorf had once touched her underneath her underwear on the body part that

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"[m]akes you pee" when he was staying at Tamora's mother's house.

¶ 4 The trial court permitted another witness, Wanda, to testify that in Nevada in 1976, when she was six years old, Glissendorf had lured her to an apartment with candy, forced her to lie down on a couch, pulled down her pants and underwear, and touched her vulva.<sup>FN3</sup> He consequently was arrested in \*249 Nevada, although that case later was dismissed. The jury found Glissendorf guilty of molesting Olivia and Tamora, and this appeal followed the imposition of sentence.<sup>FN4</sup>

FN3. We have provided a pseudonym for this witness, whose initials are C.L.

FN4. Glissendorf was acquitted of a third count of molestation against a different victim, and that charge is not a subject of this appeal.

#### Motion to Dismiss

¶ 5 Glissendorf first argues the trial court erred in denying his motion to dismiss count one of the indictment due to the state's ten-year delay in bringing the charge. Although the motion refers to "pre accusation delay" and the denial of his "right to a speedy trial," the state construed it below as a motion to dismiss based on pre-indictment delay, and we likewise treat it as such on appeal.

¶ 6 In 2001, Olivia first reported to law enforcement that Glissendorf had molested her. The state elected not to pursue charges at that time, and police closed the case. The state asserted below that it did not delay prosecution to secure any tactical advantage; rather, the delay was the result of its decision not to prosecute "a single victim case with no corroboration." When Tamora came forward in 2010 alleging that Glissendorf had committed a similar act, the first case was reopened and the state elected to charge him based on Olivia's accusations. The trial court denied the motion to dismiss without making express findings.

[1][2][3][4][5] ¶ 7 The Due Process Clauses of the Fifth and Fourteenth Amendments prevent the state from bringing criminal charges against a person when it has unreasonably delayed doing so. *State v. Lacy*, 187 Ariz. 340, 346, 929 P.2d 1288, 1294 (1996); accord *United States v. Lovasco*, 431 U.S. 783, 789, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 324-25, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). "To establish that pre-indictment delay has denied a defendant due process, there must be a showing that the prosecution intentionally delayed proceedings to gain a tactical advantage over the defendant or to harass him, and that the defendant has actually been prejudiced by the delay." *State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988); accord *Lacy*, 187 Ariz. at 346, 929 P.2d at 1294; *State v. Williams*, 183 Ariz. 368, 379, 904 P.2d 437, 448 (1995). A defendant bears a "heavy burden to prove that pre-indictment delay caused actual prejudice." *Broughton*, 156 Ariz. at 397-98, 752 P.2d at 486-87. We review a trial court's ruling on a motion to dismiss for an abuse of discretion. *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App.1997). In the absence of express findings, we will uphold the court's ruling if it is supported by any reasonable evidence in the record. See *State v. Nuckols*, 229 Ariz. 266, ¶ 7, 274 P.3d 536, 538 (App.2012).

[6] ¶ 8 Here, the record supports a finding that state officials did not intentionally delay prosecution to gain a tactical advantage or to harass Glissendorf. Instead, the record indicates the state decided not to prosecute him in 2001 because it found the evidence subject to reasonable doubt. The trial court thus did not abuse its discretion in denying the motion to dismiss. Although Glissendorf asserts the state's charging decisions with respect to count one were "wholly improper," he has cited no legal authority to support this position, and we therefore need not address the point any further. See *In re \$26,980.00 U.S. Currency*, 199 Ariz. 291, ¶ 28, 18 P.3d 85, 93 (App.2000). Because Glissendorf has failed to establish the first step in the two-

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step test, he has not demonstrated that he is entitled to relief on appeal. See *Lacy*, 187 Ariz. at 346, 929 P.2d at 1294 (claim based on pre-indictment delay fails “[a]bsent proof of an intentional delay for strategic or harassment purposes”).

[7] ¶ 9 Glissendorf nevertheless contends the Arizona Supreme Court has misinterpreted the United States Supreme Court's precedents of *Mari-on* and *Lovasco*, and he asserts that “tactical delay [i]s not a *sine qua non* of a due process violation.” Relying in part on *United States v. Moran*, 759 F.2d 777, 782 (9th Cir.1985), he maintains that unreasonable pre-indictment delay should be determined based on a balancing test, and intentional or reckless behavior by the state is not \*250 essential to the analysis. However, we are bound by the decisions of our supreme court, including its interpretation of federal constitutional rights. See *State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App.2007); see also *State v. Vickers*, 159 Ariz. 532, 543 n. 2, 768 P.2d 1177, 1188 n. 2 (1989) (Arizona courts not bound by Ninth Circuit's interpretation of what United States Constitution requires). We therefore do not address this argument further.

#### Jury Instruction

¶ 10 Glissendorf next contends the trial court erred in refusing his request for a jury instruction derived from *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). Although he did not submit his proposed instruction in writing, in accordance with Rule 21.2, Ariz. R.Crim. P., the court nevertheless understood his request as one for the following “standard” instruction:

If you find that the State has lost, destroyed, or failed to preserve evidence whose contents or quality are important to the issues in this case, then you should weigh the explanation, if any, given for the loss or unavailability of the evidence. If you find that any such explanation is inadequate, then you may draw an inference unfavorable to the State, which in itself may create a reasonable doubt as to the defendant's guilt.

State Bar of Arizona, *Revised Arizona Jury Instructions (Criminal)* Std. 10 (3d ed. rev.2012).

¶ 11 During the delay between Olivia's allegation that she was molested and the state's pursuit of charges arising from that allegation, the state destroyed a video recording of Olivia's 2001 interview with a detective from the Tucson Police Department (TPD) and an employee from Child Protective Services (CPS). The police department did not retain this evidence because its former policy called for the destruction of evidence within six to twelve months of closing a case. CPS likewise did not retain a recording of this interview. As a result, a report prepared by Detective Ridgeway in 2001 is the only extant record of Olivia's allegations at that time. That report memorializes Olivia's statement, in relevant part, as follows:

The victim told me about an incident that happened to her when she was about six years old.<sup>FN5</sup> She was staying at her [relative's] house with her sister and they were sleeping on the livingroom floor. [Glissendorf] went into the livingroom and picked up the victim[']s sister and put her into his bed. [Glissendorf] then went back into the livingroom and pulled down the victim[']s pajama bottoms and underwear down [sic] and started touching her vagina. The suspect then quit and left the room. This was the only time that this happened.

FN5. The record suggests that Olivia's statement to the detective occurred at least two years after the alleged incident.

¶ 12 As noted above, Olivia testified at the 2012 trial about two acts of molestation on the night she stayed at her relative's house: one in the living room and another in the bedroom. As to the living room incident, Olivia testified that when she awoke, she noticed her sister was no longer sleeping beside her, but she denied seeing Glissendorf carry her sister away to the bedroom. In regard to the bedroom incident, Olivia's trial testimony de-

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scribed the layout of the bedroom and her position relative to Glissendorf on the bed. She specifically recalled the television being on and an "infomercial" playing when the second molestation occurred. In addition, Olivia testified that she remembered being five years old when she was molested, because she recalled suffering a leg injury later that same year.

¶ 13 During cross-examination, Glissendorf attempted to highlight the discrepancies between Olivia's testimony and her allegations from 2001, using the police report for impeachment. Olivia maintained the report was inaccurate. She claimed that Detective Ridgeway "misheard what [she had] said" during the interview and that he had omitted the bedroom incident from his report even though she had mentioned it at the time. She further claimed that her memory of the incident was better in 2012 than in 2001.

\*251 ¶ 14 On redirect examination, the state elicited from Olivia that her interview with CPS had lasted approximately 1.5 hours, and the report summarizing that interview "was very short," consisting of only six sentences. Olivia then gave an affirmative answer when the state asked, "Would it be fair to say that you said a lot more than five or six sentences during that hour and a half worth of interview?" The state later revisited the topic of the report with Detective Stacey Lee, who had reopened the case in 2010. She offered an opinion that Detective Ridgeway's report was "brief, and it really didn't give ... a very good idea of what happened," leading her to conduct another interview with Olivia.

¶ 15 During closing argument, after the trial court had denied the proposed *Willits* instruction, the state asked the jury to consider the court's instructions relating to witness credibility when evaluating Olivia's testimony. The state maintained that, contrary to Glissendorf's assertion in his opening statement, "you didn't hear an evolution in [Olivia's] story. She testified to the exact same thing, him touching her vagina in the living room."

¶ 16 In Glissendorf's summation, he emphasized that Olivia's testimony had differed from her 2001 allegations. He noted that Olivia first reported seeing him pick up her sister and carry her to the bedroom, whereas in Olivia's "more detail[ed]" testimony at trial, her sister was not present in the living room when Olivia awoke, and it was Olivia, not her sister, who was taken into the bedroom. According to Glissendorf's theory of the case, Olivia's memory was unreliable, at minimum, and she possibly had fabricated the additional allegations about the bedroom incident because her first report had not resulted in prosecution. Glissendorf also criticized the state for "impl[y]ing ... that somehow Detective Ridgeway must be incompetent" or that his report was "just a summary" rather than a complete and accurate record of the earlier interview. In rebuttal, the state claimed that neither side could make any assumptions about the lost recording, and it maintained that Glissendorf "can't ask you to assume [the lost evidence i]s going to be against [Olivia] in any way, shape or form."

[8][9][10][11] ¶ 17 We review a trial court's ruling regarding a *Willits* instruction for an abuse of discretion. See *State v. Bolton*, 182 Ariz. 290, 309, 896 P.2d 830, 849 (1995). A defendant is entitled to a *Willits* instruction, which permits the jury to draw a negative inference against the state, when "(1) the state failed to preserve material and reasonably accessible evidence that had a tendency to exonerate the accused, and (2) there was resulting prejudice." *Broughton*, 156 Ariz. at 399, 752 P.2d at 488, quoting *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985); accord *State v. Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d 787, 795 (2009). By this standard, a defendant need not establish with certainty that the lost evidence was exculpatory; an instruction is required if the state "failed to preserve material evidence that might aid the defendant." *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993); accord *State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) ("A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the de-

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fendant.”). As our supreme court has observed, “[w]hen items are lost or destroyed a defendant is unable to determine whether they would have been helpful in his defense,” and the *Willits* instruction is designed “to overcom[e] this problem and ensur[e] a fair trial.” *State v. Leslie*, 147 Ariz. 38, 46–47, 708 P.2d 719, 727–28 (1985). Accordingly, while a defendant must do more than simply speculate that the unpreserved items would have been helpful to his case, see, e.g., *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999); *State v. Dunlap*, 187 Ariz. 441, 463–64, 930 P.2d 518, 540–41 (App.1996); *State v. Smith*, 158 Ariz. 222, 227, 762 P.2d 509, 514 (1988), he is entitled to an instruction if he can demonstrate that the lost evidence would have been material and potentially useful to a defense theory supported by the evidence. *Smith*, 158 Ariz. at 227, 762 P.2d at 514.

[12] ¶ 18 The parties here dispute the exonerating potential of the lost video recording from 2001. When deciding whether the first condition for a *Willits* instruction has been met, it is necessary to consider the \*252 nature of the case and the available evidence. In cases such as the one before us, where the principal evidence of guilt is the testimony of an alleged victim, the jury’s primary task is to assess the accuracy and credibility of that testimony. See *State v. Jerousek*, 121 Ariz. 420, 427, 590 P.2d 1366, 1373 (1979) (uncorroborated testimony of victim sufficient to convict defendant of offense); *State v. Verdugo*, 109 Ariz. 391, 393, 510 P.2d 37, 39 (1973) (same); *State v. Haston*, 64 Ariz. 72, 77, 166 P.2d 141, 144 (1946) (same).

[13][14] ¶ 19 When, as here, the alleged victim testifies about uncorroborated incidents that occurred many years in the past, any prior statements made closer in time to the incident become an especially important yardstick by which the reliability of the testimony may be assessed. To the extent those statements are inculpatory and consistent with the trial testimony, they are material and potentially useful for the prosecution.<sup>FN6</sup> To the extent those statements are inconsistent with the witness’s trial

testimony, they are material and potentially useful for the accused. See Ariz. R. Evid. 801(d)(1)(A); *Trickel v. Rainbo Baking Co. of Phx.*, 100 Ariz. 222, 226, 412 P.2d 852, 854 (1966) (noting witness’s inconsistent description of events “materially related to the subject matter”). With a concrete record of a victim’s past statements, a defendant can potentially identify any inconsistencies or other circumstances that might tend to create a reasonable doubt and suggest faulty memory, misperception, or untruthfulness by the victim.

FN6. Although prior consistent statements generally are not admissible to support the credibility of a witness’s testimony, they are admissible to rebut a challenge to the witness’s testimony. See Ariz. R. Evid. 801(d)(1)(B) (permitting prior consistent statements offered to rebut charge of recent fabrication, improper influence, or improper motive).

[15] ¶ 20 The recording of Olivia’s interview from 2001 was “obviously material ... and reasonably accessible,” *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984), as well as potentially useful for Glissendorf’s defense. This is not a case involving mere speculation, in the face of contrary indications, about the exculpatory potential of missing evidence, e.g., *Smith*, 158 Ariz. at 227, 762 P.2d at 514, or where the defendant likely “benefitted from its destruction.” *Perez*, 141 Ariz. at 464, 687 P.2d at 1219 (emphasis omitted). As Glissendorf correctly noted below when seeking the *Willits* instruction, the police report strongly suggests the video recording destroyed by the state would have been inconsistent with Olivia’s trial testimony in some significant respects.

¶ 21 The report indicates that in 2001, Olivia said the molestation incident in the living room “was the only time that this happened.” Yet at trial she testified to a second act of molestation that occurred in the bedroom. She also gave a slightly different account of the living room incident, changing what she had recalled regarding her sister and

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seemingly reversing their roles. Olivia then disputed the veracity of the police report to the extent it contradicted her testimony. Detective Lee, however, acknowledged that all TPD detectives are trained to write complete and accurate reports that include all pertinent details to an investigation.

¶ 22 In this case, as in past cases warranting reversal, “[t]he state’s questions during trial and comments during closing argument testify strongly to the materiality of the lost evidence.” *Leslie*, 147 Ariz. at 47, 708 P.2d at 728. Given Olivia’s very young age at the time of the alleged molestation and the distinct possibility of changed or false memories over the many years preceding the prosecution, her statements closer in time to the alleged offense were vital to assessing her credibility. The “contents” of the lost video recording, therefore, were critical to Glissendorf’s ability to challenge her testimony. *Willits*, 96 Ariz. at 187, 393 P.2d at 276.

¶ 23 The prejudice that resulted from the destruction of this evidence, as Glissendorf observed below, was that he was deprived of the primary tool by which he could effectively cross-examine Olivia, the state’s only witness to the incident. The state then compounded the prejudice by suggesting the police report provided both an incomplete and inaccurate record of her 2001 interview. The loss of the video thus created a two-fold harm, depriving Glissendorf of objective impeachment evidence and undermining the \*253 exculpatory impact of the evidence of the 2001 interview that survived. As the prosecutor’s questions and insinuations about the police report demonstrate, the state essentially sought a favorable inference from the destruction of the video recording—namely, that it might be consistent with Olivia’s trial testimony. And when Glissendorf attempted to argue the substance of the *Willits* instruction to the jury during closing argument, the state neutralized this effort by insisting the jury could not assume the missing evidence would be “against [Olivia] in any way, shape or form,” an assertion in direct contradiction to the in-

struction Glissendorf sought.

¶ 24 When the trial court denied the requested instruction here, it abused its discretion by applying an incorrect legal standard. *See State v. Mohajerin*, 226 Ariz. 103, ¶ 18, 244 P.3d 107, 108 (App.2010); *State v. Slover*, 220 Ariz. 239, ¶ 4, 204 P.3d 1088, 1091 (App.2009). In its ruling, the court found there had been “no[ ] ... showing that the evidence would have a tendency to exonerate the defendant.” The court further stated that “there has been no showing of exculpatory evidence within the materials that were destroyed.” While this imprecise language certainly may be found in case law surrounding *Willits*, the proper analysis, as noted above, was whether the destroyed evidence “might be exculpatory,” *Youngblood*, 173 Ariz. at 506, 844 P.2d at 1156, or “potentially helpful to the defendant,” *Lopez*, 163 Ariz. at 113, 786 P.2d at 964, and whether he suffered prejudice from its loss. *Perez*, 141 Ariz. at 464, 687 P.2d at 1219. By these standards, Glissendorf was entitled to the *Willits* instruction he requested. Indeed, the trial court acknowledged that the lost evidence provided “a basis for cross-examination.” To the extent the court nonetheless determined that no prejudice resulted from the loss of the video, the record does not support this conclusion. *See Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App.2001) (observing “court abuses its discretion where the record fails to provide substantial support for its decision”). As discussed above, the destruction of the video recording deprived the defendant of the primary tool by which he could challenge the evidence against him.

[16] ¶ 25 We are not persuaded by the state’s arguments in support of the trial court’s ruling. Specifically, the state contended below that Glissendorf was not entitled to a *Willits* instruction in the absence of a showing that the state had acted in bad faith. We agree that there is no suggestion of bad faith on the record before us, but such a showing is not required for a *Willits* instruction to issue. Although the supreme court acknowledged in *Willits* that a bad faith effort to conceal the truth might mo-

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tivate the state to destroy evidence, the court also emphasized that "[e]vidence ... may be innocently destroyed without a fraudulent intent simply through carelessness or negligence or ... an unwillingness to make the necessary effort to preserve it." 96 Ariz. at 191, 393 P.2d at 279. And in that event, "the State cannot be permitted the advantage of its own conduct in destroying evidence which might have substantiated the defendant's claim regarding the missing evidence." *Id.* Here, the destruction of the evidence pursuant to TPD policy, coupled with the lack of an instruction, gave the state this very advantage.

[17][18] ¶ 26 Indeed, had the trial court concluded that the state had destroyed the video in bad faith, the remedy would have been more than a jury instruction. "When the state exhibits bad faith in the handling of critical evidence, it is fundamentally unfair to allow the trial to proceed," and the remedy is to bar the prosecution of the case. *Youngblood*, 173 Ariz. at 507, 844 P.2d at 1157. But even when a trial court does not make a finding of bad faith, a *Willits* instruction nonetheless allows a jury to draw that inference if the circumstances warrant it. "[F]raudulent intent ... is a fact which may be inferred from all the evidence." *Willits*, 96 Ariz. at 191, 393 P.2d at 279. Yet bad faith is not needed for the instruction to "operate in the defendant's favor." *Id.*

[19] ¶ 27 In a similar vein, the state contends "this is not the kind of situation a *Willits* instruction is designed to remedy," because the state's initial decision not to prosecute provided "a fully adequate explanation for the loss of the evidence." To the \*254 extent this argument urges us "not [to] penalize the prosecution when its action is neither malicious nor inadvertent," this is the dissenting view from *Willits*, which we are neither inclined nor at liberty to adopt. 96 Ariz. at 192, 393 P.2d at 279 (Udall, C.J., dissenting). Moreover, we disagree with the state that destroying the video recording was consistent with its duty to preserve material evidence. See *Leslie*, 147 Ariz. at 47, 708 P.2d at

728; *Perez*, 141 Ariz. at 463, 687 P.2d at 1218. If the state wishes to preserve its flexibility to reopen cases in the event that more evidence becomes available, then it is negligent to also have a policy of destroying material evidence after closing a case, especially after only six to twelve months. Indeed, it would appear entirely foreseeable, in cases involving allegations of sex crimes against children, that subsequent events might corroborate prior allegations. That is, of course, precisely what happened here.

[20][21][22][23] ¶ 28 More fundamentally, however, we disagree with the state's suggestion that a defendant must demonstrate the state's negligence or wrongdoing to be entitled to an instruction. Ordinarily, when the materiality and exonerating potential of evidence is established, and when the state possessed or had reasonable access to this evidence, then some degree of fault is implied by its loss, and the instruction is appropriate. See *State v. Hill*, 174 Ariz. 313, 321 n. 4, 848 P.2d 1375, 1383 n. 4 (1993) (noting instruction warranted "when the state fails to preserve evidence important to the case"). It bears mention that *Willits* expressly applies to situations where evidence is "innocently destroyed," because "the damage to the defendant is equally great." 96 Ariz. at 191, 393 P.2d at 279. A *Willits* instruction is primarily designed to be remedial, and even prophylactic; it is not a punitive or deterrent measure. The instruction promotes fairness in proceedings where the destruction of evidence does not violate a defendant's right to due process and require the dismissal of charges. See, e.g., *State v. Bocharski*, 200 Ariz. 50, ¶ 43, 22 P.3d 43, 52 (2001) (instruction made "jurors ... free to consider this less-than-ideal police work in deciding the matter"); *State v. Vickers*, 180 Ariz. 521, 528, 885 P.2d 1086, 1093 (1994) (instruction adequate when defendant lost opportunity to independently test evidence); *State v. Schad*, 163 Ariz. 411, 416, 788 P.2d 1162, 1167 (1989) (instruction "accomplished the most that the defendant could have proved" from destroyed evidence); *State v. Tucker*, 157 Ariz. 433, 443, 759 P.2d 579, 589

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(1988) (instruction allowed "jury [to] infer exactly what the destroyed evidence, at best, could have proved"); cf. *State v. Escalante*, 153 Ariz. 55, 61, 734 P.2d 597, 603 (App.1986) (finding dismissal required when state destroyed critical evidence that could have proved exonerating). Moreover, the actual content of a *Willits* instruction is far from catastrophic to the state's case. It expressly preserves the jury's discretion to give the state's destruction of evidence any weight the jury sees fit in light of the case before it and the circumstances of the destruction.

[24][25] ¶ 29 The state correctly points out that both *Youngblood* and *Willits* speak of the adequacy of the state's explanation for the loss of evidence.<sup>FN7</sup> But the state misunderstands the import of this language, which actually relates to the jury weighing the evidence. A *Willits* instruction "direct[s] the jurors' attention to all matters properly within the issues for their determination," including the state's explanation for the lost evidence. *Willits*, 96 Ariz. at 189, 393 P.2d at 277-78. The instruction serves to clarify the permissive inferences available in the case, see *State v. Eagle*, 196 Ariz. 27, ¶ 19, 992 P.2d 1122, 1126 (App.1998), and the state's proffered reason for failing to preserve material evidence is relevant to what inferences, if any, the jury actually draws. See \*255*Youngblood*, 173 Ariz. at 506, 507, 844 P.2d at 1156, 1157; see also *State v. Mitchell*, 140 Ariz. 551, 557, 683 P.2d 750, 756 (App.1984) (rejecting claim that lost evidence necessarily entitles defendant to favorable inference). The state's motivation and fault in failing to preserve evidence, therefore, are usually considerations for the jury when deciding whether the state has met its burden of proving guilt beyond a reasonable doubt.

FN7. See *Youngblood*, 173 Ariz. at 506, 844 P.2d at 1156 ("[I]f [jurors] find that the state has lost, destroyed or failed to preserve material evidence that *might* aid the defendant and they find the explanation for the loss inadequate, they may draw an

inference that that evidence would have been unfavorable to the state."); *Willits*, 96 Ariz. at 191, 393 P.2d at 279 ("Had the instruction been given, the jury would have been in the position of weighing the explanation and, if they believed it was not adequate, an inference unfavorable to the prosecution could have been drawn.").

[26] ¶ 30 In a different line of argument, the state points to case law from Division One of this court which states that for a *Willits* instruction to be warranted, "evidence must possess exculpatory value that is apparent before it is destroyed." *State v. Davis*, 205 Ariz. 174, ¶ 37, 68 P.3d 127, 133 (App.2002); accord *State v. Walters*, 155 Ariz. 548, 551, 748 P.2d 777, 780 (App.1987); *State v. Tinajero*, 188 Ariz. 350, 355, 935 P.2d 928, 933 (App.1997), *disapproved on other grounds by State v. Powers*, 200 Ariz. 363, ¶ 10, 26 P.3d 1134, 1135 (2001). But our supreme court appears to have neither adopted nor applied this standard. In *Leslie*, our supreme court implied that the exculpatory potential of certain evidence can depend upon trial developments. See 147 Ariz. at 47, 708 P.2d at 728. And in *Perez*, the court specifically provided a test, albeit in judicial dictum, for giving a *Willits* instruction in "situations [when] it may not be clear that a particular bit of evidence of which the state is aware is, or will prove to be, material." *Perez*, 141 Ariz. at 464 n. 5, 687 P.2d at 1219 n. 5.<sup>FN8</sup>

FN8. In that event, the supreme court has emphasized that the state's fault is a threshold question to be decided by the trial court:

When the state fails to procure and/or assure the preservation of evidence that, though not obviously material, turns out to be material, it is up to the trial judge to determine if the state's failure to recognize its materiality was reasonable or not and to give a *Willits* instruction only where it finds the failure to have been unreasonable.

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*Perez*, 141 Ariz. at 464 n. 5, 687 P.2d at 1219 n. 5.

¶ 31 Notably, the Division One cases cited all rely upon *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). But the issue in that case was whether the destruction of evidence resulted in a due process violation that required the suppression of evidence. *Id.* at 483–84, 104 S.Ct. 2528. Whether police have breached their duty under the due process clause to collect or preserve potentially exculpatory evidence is an inquiry that ultimately depends on whether the police acted in bad faith. *See Speer*, 221 Ariz. 449, ¶¶ 36–37, 212 P.3d at 795; *Youngblood*, 173 Ariz. at 506, 844 P.2d at 1156; *Dunlap*, 187 Ariz. at 452, 930 P.2d at 529. A *Willits* instruction is a lesser remedy than suppression of evidence that applies in the absence of a finding of bad faith and when the failure to preserve evidence does not violate due process. *See Youngblood*, 173 Ariz. at 506–07, 844 P.2d at 1156–57; *see also State v. O'Dell*, 202 Ariz. 453, ¶ 26, 46 P.3d 1074, 1081 (App.2002) (recognizing *Willits* instruction may be appropriate in particular cases, notwithstanding lack of due process obligation to preserve breathalyzer data). The due process standard of constitutional materiality, therefore, is different than the materiality standard for a *Willits* instruction. And even were we to accept the state's contrary proposition, we still would find an instruction warranted here, because the exculpatory value of a young child's interview is apparent in “a single victim [molestation] case with no corroboration”—especially when the state initially has declined to prosecute.

[27] ¶ 32 The state has not argued that the failure to provide a jury instruction was harmless here, nor could we find it to be so. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). The evidence of the defendant's guilt on count one turned entirely on the reliability of Olivia's testimony about an incident that purportedly occurred some twelve to fourteen years earlier, and which she had first reported two years after the event. For

this reason, the contents of the lost video recording that documented Olivia's prior statements became a central issue in the case. Because we cannot find the error had no effect on the jury's verdict on count one, *see id.*, we reverse the conviction and sentence on this count. We do not disturb the conviction on count two on this ground because the requested instruction applied only to count one, and Glissendorf has \*256 not developed an argument showing he is entitled to relief on count two as a result of the error concerning count one. *See State v. Edwards*, 1 Ariz.App. 42, 44, 399 P.2d 176, 178 (1965) (observing appellant always carries burden of demonstrating error); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (noting failure to develop and support legal argument in accordance with Rule 31.13, Ariz. R.Crim. P., results in waiver and abandonment of claim).

#### Evidence of Aberrant Sexual Propensity

[28] ¶ 33 Last, Glissendorf maintains the trial court erred in granting the state's pretrial motion and admitting Wanda's testimony pursuant to Rule 404(c), Ariz. R. Evid., over his objection. We review a court's admission of evidence under Rule 404(c) for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29, 97 P.3d 865, 874 (2004).

[29] ¶ 34 When a defendant is charged with a sexual offense, Rule 404(c) provides that “evidence of other crimes, wrongs, or acts may be admitted ... if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.” The rule directs the trial court to make a number of findings on the record before such other-act evidence may be admitted. Ariz. R. Evid. 404(c)(1)(D). Specifically, the court must find each of the following conditions is met:

(A) The evidence is sufficient to permit the trier of fact to find that the defendant committed the other act.

(B) The commission of the other act provides a reasonable basis to infer that the defendant had a

**ARIZONA SUPREME COURT**

STATE OF ARIZONA,

Appellee,

v.

ROBERT CHARLES GLISSENDORF,

Appellant.

CR 13-0388-PR

2 CA-CR 2012-0405

Pima COUNTY  
Superior Court  
No. CR-2011-2756-001

**THE STATE OF ARIZONA'S CROSS-PETITION FOR REVIEW**

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## **I. ISSUE PRESENTED FOR REVIEW.**

When the State loses or destroys obviously material, potentially exculpatory evidence, a *Willits* instruction permits a jury to infer the unpreserved evidence would have exonerated the defendant.<sup>1</sup> Applying settled law, the trial court in this case denied Appellant's request for a *Willits* instruction on the basis he had failed to demonstrate the unpreserved evidence would have tended to exonerate him.

The court of appeals reversed. It held that, to be entitled to a *Willits* instruction, a defendant need only show the unpreserved evidence might have been "potentially helpful" to his defense and that the evidence need not have had any apparent exculpatory value at the time of loss. The court also held that the State's explanation for not preserving the evidence is inconsequential to whether a *Willits* instruction must be given.

Did the court of appeals err in so holding?

## **II. ADDITIONAL ISSUES PRESENTED BUT NOT DECIDED.**

Was Appellant convicted on an impermissibly duplicitous charge of molestation, when Appellant offered at trial a single defense of blanket denial and there was no reasonable basis to distinguish between the two allegedly duplicitous molestation incidents?

## **III. FACTS MATERIAL TO ISSUE.**

¶ 1 In the spring of 2001, E.G., Appellant's niece, reported that, sometime between December 1997 to December 1999, when she was 5 to 7 years old,

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<sup>1</sup> *State v. Willits*, 98 Ariz. 184, 393 P.2d 274 (1964). See also State Bar of Arizona, REVISED ARIZONA JURY INSTRUCTIONS (CRIMINAL) Std. 10 (3d Ed. Rev. 2012) (standard *Willits* instruction).

Appellant molested her by fingering her vagina while she was asleep one night at a family residence. (R.T. 7/25/12, at 15–22.) A Tucson police officer conducted a taped interview of E.G., after which he prepared a supplementary report summarizing the interview. (R.O.A. Item 63.) According to that report, E.G. stated she and her sister were sleeping on the living room floor of her grandparents' home when Appellant put her sister into his bed, returned to the living room, pulled down E.G.'s pajama bottoms and underwear, and fingered her vagina. (*Id.*) The report states “[t]his was the only time that this happened.” (*Id.*)

¶ 2 Shortly thereafter, the prosecutor's office determined not to prosecute Appellant because “the victim waited four years to tell anyone and she never told an adult.” (*Id.*; R.T. 5/29/12, at 15.) At the time, it was standard Tucson police procedure to dispose of evidence within 6 to 12 months following a no-prosecution determination. (R.T. 7/25/12, at 150.) Following this practice, Tucson police later disposed of the interview recording. (R.O.A. Item 63; R.T. 5/29/12, at 23.)

¶ 3 Around 8 years later, another victim came forward with a strikingly similar allegation of molestation against Appellant. (R.T. 7/25/12, at 53, 71, 111–15.) I.K., 5 years old, reported that, in January 2010, she and her sister stayed overnight at their mother C.'s residence. (*Id.* at 47–51, 69–71.) Appellant, C.'s boyfriend's father, stayed there also. (*Id.*) I.K., sleeping in the living room, awoke to find Appellant fingering her vagina underneath her underwear, and she saw Appellant

doing the same thing to her sister. (*Id.* at 50–52.) I.K. reported the incident to her father, who notified the police. (*Id.* at 53, 71, 111–15.) The police thereafter learned of E.G.’s 2001 allegation against Appellant, as well as of a third molestation by Appellant, this one committed against C.L. in 1976. (*Id.* at 112–18; R.T. 7/26/12, at 20–21.)

¶ 4 The State charged Appellant with two counts of molestation, the first against E.G. and the second against I.K. (R.O.A. Item 1.) At trial, I.K. testified regarding the January 2010 molestation. (R.T. 7/25/12, at 47–53, 69–71.) E.G., 20 at the time of trial, testified regarding the 2001 molestation in which she awoke to find herself bottomless and Appellant fingering her vagina. (*Id.* at 15, 18.) She added, however, that, later that night, she awoke again to find herself in the bedroom where Appellant was staying. (*Id.* at 16–19.) Appellant was doing the “exact same thing”—fingering her vagina. (*Id.*)

¶ 5 C.L., 42 at the time of trial, testified that, in 1976, when she was 6, Appellant lured her near his apartment and then brought her inside, locking the door behind him. (R.T. 7/26/12, at 12–16.) Appellant fingered her vagina, after which he gave her \$2 and released her. (*Id.*) Appellant was tried for that offense but not convicted, evidently because C.L. was too scared to testify fully at trial. (*Id.* at 18–20, 88–89.)

¶ 6 Appellant's defense at trial was that the victims were lying. (R.T. 7/26/12, at 87–99.) Appellant, however, admitted he had stayed overnight in the houses as testified to by I.K. and E.G. (*Id.* at 113–19.) Appellant also admitted he had no explanation for E.G.'s and I.K.'s separate accusations of molestation. (*Id.*)

¶ 7 Appellant requested a *Willits* instruction regarding the State's disposal of the recording of E.G.'s 2001 interview. (R.T. 7/25/12, at 242–43.) The trial court denied the request because there had been no "malicious destruction" of the recording and because it had no tendency to exonerate Appellant. (*Id.*) A jury convicted Appellant of molesting E.G. and I.K., and the trial court sentenced him to consecutive 17-year prison terms. (R.O.A. Item 105.)

¶ 8 The court of appeals reversed Appellant's conviction for molesting E.G. (Opinion, at ¶¶ 32, 43.) The court held that a defendant is entitled to a *Willits* instruction if he can demonstrate the unpreserved evidence "might" have been "potentially helpful to the defendant." (Opinion, at ¶ 24.) The court concluded the recording met this standard because it was "vital to assessing [E.G.'s] credibility" and "critical to [Appellant's] ability to challenge [E.G.'s] testimony." (Opinion, at ¶¶ 17, 22.)

¶ 9 The court also held a defendant need not "demonstrate negligence or wrongdoing to be entitled to a [*Willits*] instruction" and that the adequacy of the State's explanation for the loss is solely a jury question. (Opinion, at ¶ 28.) The

court also held that the exculpatory value of the unpreserved evidence need not have been apparent prior to its loss. (Opinion, at ¶ 30.)

#### IV. REASONS THIS COURT SHOULD GRANT REVIEW.

¶ 10 The court of appeals found reversible error in the trial court's refusal to give a *Willits* instruction for the State's disposal of purely inculpatory evidence—the recording of the 2001 interview in which E.G. accused Appellant of molesting her. That recording was destroyed in accordance with standard police practice following a no-prosecution determination, and it did not become relevant to any criminal prosecution until nearly 8 years later, when another victim came forward with a virtually identical accusation of molestation against Appellant.

¶ 11 The court of appeals' finding of error discards fundamental *Willits* principles that conclusively resolve the issue in favor of the State. It also purports to drastically redefine *Willits* jurisprudence: as it stands, it requires a *Willits* instruction any time the State fails to preserve evidence “potentially helpful to the defendant,” regardless of how non-exculpatory the evidence was at the time of loss, and regardless of the State's explanation for its nonpreservation, no matter how reasonable.

¶ 12 The opinion at issue vastly expands *Willits*' scope. It is certain to sow misapprehension and confusion among the courts and counsel regarding *Willits*' function and applicability. Given *Willits*' ubiquity in Arizona criminal practice and

the frequency with which *Willits* issues arise, it is imperative that this Court grant review and clarify *Willits*' proper scope.

**A. The court of appeals erred in holding that unpreserved evidence need only have been “potentially useful” to the defense to require a *Willits* instruction.**

¶ 13 It is settled that a defendant is not entitled to a *Willits* instruction unless he can demonstrate the lost evidence would have had a tendency to exonerate him. *State v. Hunter*, 136 Ariz. 45, 664 P.2d 195 (1983); *State v. Reffitt*, 145 Ariz. 452, 461, 702 P.2d 681, 690 (1985); *State v. Speer*, 221 Ariz. 449, 457, ¶ 40, 212 P.3d 787, 795 (2009). Indeed, the instruction was “designed to be given to the jury when the state destroys evidence which could exonerate the defendant.” *State v. Axley*, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982). Even the opinion recites this requirement. (Opinion, at ¶ 17.)

¶ 14 This Court's holdings regarding *Willits* sharply illustrate the requirement of exonerative potential. *Willits* held the instruction required when the State destroyed evidence—dynamite and certain wires attached thereto—that was “the very key to [Willits'] defense,” which was that he had disabled the dynamite so it could not detonate and that the detonating cap had discharged only accidentally. *Willits*, 96 Ariz. at 187, 393 P.2d at 276. Had the evidence not been destroyed, it “might have tended to exonerate [him].” *State v. Garrison*, 120 Ariz. 255, 259, 585 P.2d 563, 567 (1978). *Hunter* held the instruction required when the State failed to

preserve scissors found next to the deceased victim because, had it been preserved and found to contain the victim's fingerprints, it "would have tended to corroborate appellant's [self-defense] claim" and thereby exonerate him. *Hunter*, 136 Ariz. at 50–51, 664 P.2d at 200–01.

¶ 15 A *Willits* instruction is not appropriate, let alone required, when the defendant "fails to demonstrate that the absent evidence would have exonerated him." *State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988); *State v. Fulminante*, 193 Ariz. 485, 505, ¶ 62, 975 P.3d 75, 95 (1999). See also *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (*Willits* instruction not required when defendant "presented no evidence to support his assertion that had the [evidence] been presented to the jury, he would have been acquitted"). Absent at least some potential to exonerate, giving a *Willits* instruction presents a risk of misleading the jury. *Axley*, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982).

¶ 16 The trial court rejected Appellant's *Willits* request on the following basis:

[T]he court does find that there has not been a showing that the evidence would have a tendency to exonerate the defendant. In other words, there has been no showing of exculpatory evidence within the materials that were destroyed.

(R.T. 7/25/12, at 242.) That is the correct standard.

¶ 17 The court of appeals, however, held that the trial court "appl[ied] an incorrect legal standard." (Opinion, at ¶ 24.) Terming this Court's settled, tendency-to-exonerate standard "imprecise," the court held a defendant is entitled

to a *Willits* instruction if he can demonstrate the unpreserved evidence “might be . . . potentially helpful to the defendant.” (Opinion, at ¶ 24; *see also* Opinion, at ¶ 17 (defendant need only demonstrate the lost evidence “would have been material and potentially useful to a defense theory supported by the evidence”).

¶ 18 The court of appeals’ “potentially helpful to the defendant” standard is fundamentally wrong. While this Court has used the same or similar language to describe the general import of a *Willits* instruction, *see State v. Lopez*, 163 Ariz. 108, 113, 786 P.2d 959, 964 (1990) (“A *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant); *State v. Youngblood*, 173 Ariz. 502, 844 P.2d 1152 (1993) (describing *Willits* as applying to unpreserved evidence that “*might* aid the defendant”), this Court has never held it to be the determinative *Willits* standard. Rather, this Court has consistently and uniformly required a potential to exonerate.

¶ 19 *State v. Murray*, 184 Ariz. 9, 906 P.2d 542 (1995), illustrates this distinction. Quoting *Lopez*, *Murray* states “[a] *Willits* instruction is appropriate when the state destroys or loses evidence potentially helpful to the defendant.” 184 Ariz. at 33, 906 P.2d at 566 (citation omitted). *Murray* then clarifies, however, that the “[d]estruction or nonretention of evidence does not automatically entitle a defendant to a *Willits* instruction,” and that, to be entitled to the instruction, a defendant “must show . . . the state failed to preserve material and reasonably

accessible evidence having a tendency to exonerate him,” and resulting prejudice. *Id.* Applying that standard, *Murray* held the defendant not entitled to a *Willits* instruction because “none of the allegedly unavailable evidence tended to exonerate him.” *Id.*

¶ 20 The potential ramifications of the court of appeals’ error are enormous. The Arizona courts have uniformly limited *Willits* to a specific class of evidence that, owing to its nature or quality, possesses at least some potential to exonerate—to create a reasonable doubt of guilt. “Potentially useful” or “helpful” evidence, in contrast, encompasses virtually all evidence that merely aids the defense, including evidence that is not, by itself, potentially exculpatory. *Willits* does not apply to such a sweeping class of evidence.

¶ 21 The trial court acted well within its discretion in finding that Appellant failed to demonstrate exonerative potential in E.G.’s interview recording. E.G. alleged in that interview that Appellant had molested her by fingering her vagina when she was asleep on the living room floor. (R.O.A. Item 63.) She testified to that exact incident at trial. (R.T. 7/25/12, at 15–18.) Accepting that the supplementary report states that E.G. had originally reported one instance of molestation instead of two,

requirement relates only to “[t]he due process standard of constitutional materiality,” which it concluded “is different than the materiality standard for a *Willits* instruction.” (Opinion, at ¶ 31.)

¶ 24 The court of appeals erred. Regarding unpreserved, potentially exculpatory evidence, *Willits* and constitutional due process protections go hand in hand: where the State fails to preserve potentially exculpatory evidence, but the defendant cannot demonstrate the bad faith required for a due process violation, a *Willits* instruction ensures fundamental fairness by allowing the jury to infer reasonable doubt if it finds the State’s explanation for the loss inadequate. *Youngblood*, 173 Ariz. at 506–07, 844 P.2d at 1156–57; *State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987); *State v. Schad*, 163 Ariz. 411, 416, 788 P.2d 1162, 1167 (1989). The pivotal difference is not what constitutes “material” evidence in either context, but the presence or absence of bad faith. *See Youngblood*, 173 Ariz. at 507, 844 P.2d at 1157 (asking rhetorically “if bad faith were read out of due process analysis [for] unpreserved potentially exculpatory evidence, when would *Willits* ever be appropriate?”).<sup>3</sup>

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<sup>3</sup> Indeed, it is because *Willits* is not constitutionally required (nor is it required by statute or court rule) that the State has previously argued that *Willits* should be overruled. *State v. Lang*, 176 Ariz. 475, 485 862 P.2d 235, 245 (App. 1993). For that reason, and because of its recognized potential to mislead the jury, *Axley*, 132 Ariz. at 393, 646 P.2d at 278, Appellee urges this Court to reconsider *Willits*.

¶ 25 This Court has previously recognized a requirement of apparent materiality in the *Willits* context. *Perez* held that a defendant is entitled to a *Willits* instruction “where the state fails to act in a timely manner to ensure the preservation of evidence that is *obviously material*, and reasonably accessible.” 141 Ariz. at 464, 687 P.2d at 1219 (emphasis added). *Perez*, moreover, specifically addresses latent materiality:

We realize that in some situations it may not be clear that a particular bit of evidence of which the state is aware is, or will prove to be, material. When the state fails to procure and/or assure the preservation of evidence that, though not obviously material, turns out to be material, it is up to the trial judge to determine if the state’s failure to recognize its materiality was reasonable or not and to give a *Willits* instruction only where it finds the failure to have been unreasonable.

*Id.* at 464, n. 5, 687 P.2d at 1219, n. 5.

¶ 26 The court of appeals’ rejection of an apparent materiality requirement is unsupportable. It is irreconcilable with *Perez*. It exponentially compounds the court of appeals’ error that only a showing of potential usefulness to the defense is required: taken together, those errors require a *Willits* instruction any time the State fails to preserve evidence potentially useful to the defense at any time, present or future. That is a staggering expansion of *Willits*.

**C. The court of appeals erred in holding that the State's explanation for not preserving the evidence has no bearing on whether a *Willits* instruction must be given.**

¶ 27 It is indisputable that the State disposed of the recording in good faith accordance with standard practice following a no-prosecution determination and at a time when the recording had no apparent exculpatory value. This forecloses error, because, for a *Willits* instruction to be appropriate, there must be "some reasonable basis to find the State's explanation for the loss inadequate." (State's Answering Brief, at ¶ 29.) The court of appeals, however, held that the State's explanation for the loss is solely a question for the jury. (Opinion, at ¶¶ 28–29.)

¶ 28 The court of appeals erred. The very purpose of a *Willits* instruction is to permit an unfavorable inference to the State when the State fails to preserve material evidence and the jury "find[s] the explanation for the loss inadequate." *Youngblood*, 173 Ariz. at 506, 844 P.2d at 1156; *Willits*, 96 Ariz. at 191, 393 P.2d at 279. Therefore, to warrant a *Willits* instruction, there must be some evidence reasonably supporting a finding of inadequacy. *See, e.g., State v. Patterson*, 230 Ariz. 270, 276, ¶ 27, 283 P.3d 1, 7 (2012) (evidence must support a given jury instruction). If no reasonable juror can find the State's explanation inadequate, a *Willits* instruction is not appropriate and may even mislead the jury. *See id.* (lesser included offense instruction not required when no reasonable juror can find for it); *Axley*, 132 Ariz. at 393, 646 P.2d at 278. That is why "it is up to the trial judge to

determine if the state's failure to recognize . . . materiality was reasonable or not and to give a *Willits* instruction only where it finds the failure . . . unreasonable."

*Perez*, 141 Ariz. at 464, n. 5, 687 P.2d at 1219, n. 5.

¶ 29 The State had a fully adequate explanation for the loss of the recording: its initial determination not to prosecute. The recording did not become relevant to any criminal prosecution until several years afterwards, when Appellant molested another victim. By that time, the recording had long been disposed of. No reasonable juror could find the State's explanation inadequate, especially given the recording's total lack of exculpatory value at the time of disposal. The evidence did not support a *Willits* instruction.

#### IV. CONCLUSION.

¶ 30 For the foregoing reasons, Appellee requests that this Court grant review.

RESPECTFULLY SUBMITTED this 12th day of December, 2013.

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